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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 998

ESTATE OF B. H. KROGER, Deceased, CHESTER F. KROGER, IRVING W. PETTENGILL, RUDOLF HOMAN and THE PROVIDENT SAVINGS BANK AND TRUST COMPANY, Executors,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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ESTATE OF B. H. KROGER, Deceased, CHESTER F. KROGER, IRVING W. PETTENGILL, RUDOLF HOMAN and THE PROVIDENT SAVINGS BANK AND TRUST COMPANY, Executors,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Estate of B. H. Kroger, deceased, Chester F. Kroger, Irving W. Pettengill, Rudolf Homan and The Provident Savings Bank and Trust Company, Executors, by their attorneys, respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered December 4, 1944, affirming the decision of The Tax Court of the United States entered November 17, 1943.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, by the Act of February 13, 1925, 43 Stat. 938.

OPINIONS BELOW

The Memorandum Findings of Fact and Opinion of The Tax Court of the United States upon the trial of the case is printed at pages 64-86 of the Record.

The opinion of the Circuit Court of Appeals for the Sixth Circuit, affirming the decision of The Tax Court of the United States, entered November 17, 1943 (R. 87), was handed down December 4, 1944, is printed at pages 250-263 of the Record and is reported in ... F. (2d) ....

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are printed in the Appendix, infra.

QUESTIONS PRESENTED

Two questions are presented in this petition: (1) whether two transfers in trust made by B. H. Kroger on February 13, 1928, were made in contemplation of death within the meaning of Section 302(c) of the Revenue Act of 1926, as amended, so as to require the value thereof to be included in the gross estate; and (2) alternatively, if the transfers were made in contemplation of death, whether only to the extent of the interest in the property then transferred, namely, .69565, is the value of the property, at date of death, includible in the gross estate.

STATEMENT OF THE CASE

This action was instituted in The Tax Court of the United States by the executors of the Estate of B. H. Kroger, deceased, filing a petition from a determination by the Commissioner of Internal Revenue of a deficiency in Federal estate tax of $12,524,987.81 (R. 18).

B. H. Kroger was born on January 24, 1860, at Cincinnati, Ohio, where he resided continuously thereafter until his death on July 21, 1938 (R. 89). He was the founder of Kroger Grocery and Baking Company, its principal stockholder, president and director (R. 89). Kroger was also president and a director of one bank and a director of two others (R. 90).

Kroger's first wife died in 1899; to which marriage were born six children, all of whom were living in 1928, and some of whom had children of their own (R. 90, Ex. 7).

After the sale of his Kroger Grocery and Baking Company stock early in 1928 for $24,397,000 cash (R. 90), the major portion of which he promptly invested in United States Government Securities (R. 140), and the gift of $1,000,000 to each of his six children (R. 92), Kroger, then 68 years old and a widower (R. 79, 90), informed his son, Chester, that he planned to remarry; that he wanted to make a prenuptial agreement with his prospective wife because he did not want the bulk of his estate to go to her (R. 138); that he wanted his children and blood grandchildren to have the benefit of it (R. 138). Chester objected to a prenuptial agreement for fear of law suits, and he prevailed upon his father to create an irrevocable trust as a substitute for a prenuptial agreement (R. 137-139), resulting in Kroger executing two such trusts on February 13, 1928, to one of which he transferred $10,000,000 and to the other $2,000,000 in United States Treasury notes (Exs. 5-E and 3-C).

By the terms of each trust indenture, Kroger provided for payment to himself of the entire net income of the trust during the period of his life, for payment of the entire net income to his surviving children after his death, and for distribution of the corpus to his grandchildren upon the death of the survivor of his children (Exs. 5-E and 3-C).

At the time of the creation of the trusts, Kroger was in good health (R. 79); and the transfers were not motivated either because of any concern for his health or because of any purpose to avoid taxes (R. 79). He never mentioned to Chester the thought of death or the thought of a testamentary disposition of his estate (R. 117). Kroger married a Mrs. Maher, as he had theretofore planned, on March 3, 1928 (R. 71).

In his will, executed August 4, 1928, Kroger set up a testamentary trust for his wife, and provided in lieu thereof, that she should have the right to receive her statutory interest in his estate, if she so elected (Ex. 6-F). The making of the will was in no wise connected with the transfers here in question (R. 80).

The Tax Court stated in its Findings of Fact that the transfers were made by Kroger "for the purpose of barring his wife from any statutory rights in the transferred property in case the woman whom he was about to marry should survive him and were made in contemplation of death" (R. 74). In seeking Kroger's "dominant motive" in making the transfers the Tax Court stated in its Opinion: "He was contemplating marriage, not death. Marriage is associated with life" (R. 82). The Tax Court also stated in its Opinion that Kroger's "dominant motive" in making the transfers "was to bar his future wife from any statutory rights of dower which she might have in his estate, if she should survive him" (R. 83).

The trusts entitled Kroger during his life to the net income of the properties held in trust (Exs. 5-E and 3-C). His life expectancy, at age 68, at the time of the creation of the trusts was 9.47 years (R. 181), and his retained interests in the properties transferred in trust measured by his life expectancy was .30435 of the whole and the extent of the interests transferred by the trusts in the properties transferred in trust was .69565. ("Table A," of Section 81.10 of Estate Tax Regulations 105 and of Section 86.19 of Gift Tax Regulations 108.)

The Tax Court of the United States, having held that the interests in the trust properties transferred by trust by Kroger on February 13, 1928 were transferred by him in contemplation of his death, further held that the entire value of the trust properties at the date of his death was includible in gross estate rather than .69565 thereof (R. 85, 86).

The decision of the Tax Court of the United States was affirmed by the Circuit Court of Appeals for the Sixth Circuit (R. 263).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

(1) In affirming the decision of The Tax Court of the United States that the purpose of Kroger of barring his wife from any statutory rights in the transferred property in case the woman he was about to marry should survive him, is legally sufficient to bring the transferred properties into gross estate as transfers in contemplation of death within the meaning of Section 302(c) of the Revenue Act of 1926, as amended.

(2) In deciding that the transfers in trust were made in contemplation of death.

(3) Alternately, if the transfers in trust were made in contemplation of death, in deciding that more than .69565

of the value of the trust properties at date of death is includible in gross estate.

REASONS FOR GRANTING THE WRIT

(1) The Circuit Court of Appeals for the Sixth Circuit has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

(2) The Circuit Court of Appeals for the Sixth Circuit has decided an important question of Federal law, which has not been, but should be, settled by this Court.

CONCLUSION

Certiorari should be granted.

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BRIEF IN SUPPORT OF PETITION

I

THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

Whether a transfer in trust was made in contemplation of death is a question of fact (*Colorado National Bank of Denver et al.* v. *Commissioner,* 305 U. S. 23), a principle fully appreciated by petitioners. So too is the value of a gift at a particular date a question of fact, but the criterion to be employed for determining such value is a question of law (*Powers* v. *Commissioner,* 312 U. S. 259); and this Court is not bound by the finding of a lower court reached upon the application of erroneous legal standards (*Helvering* v. *American Dental Co.,* 318 U. S. 322), or upon the erroneous interpretation of the term "in contemplation of death" (*Colorado National Bank of Denver et al.* v. *Commissioner, supra*).

The statutory significance of the phrase "in contemplation of death" found in Section 302(c) of the Revenue Act of 1926, as amended, is fully discussed in *United States* v. *Wells,* 283 U. S. 102. In the *Colorado National Bank* case, this Court adhered to the principles of the *Wells* case. The *Colorado National Bank* case presents a striking similarity factually to the instant case. There the grantor, 5½ years before his death, when 80 years old and in good health, irrevocably conveyed securities of large value in trust under the provisions of which income should be accumulated during his life and after his death distributed in requested amounts to his daughter during her life, and corpus should be distributed to her descendants at her death. The Circuit Court of Appeals for the Tenth Circuit found that the grantor's dominant purpose was to

make provision for his descendants after his death in the event his speculations proved tragic and to place a substantial amount of property in an asylum of immunity from adverse consequences of speculation, in order to make certain that it would be used for his daughter and her children after his death.

Here, Kroger, 10½ years before his death, when 68 years old and in good health, irrevocably conveyed securities of large value in trusts, retaining the income therefrom for his life and providing for distribution after his death of the income to his children during their lives and of the corpora to his descendants upon the death of his last surviving child. The purpose found by the Tax Court, implicitly approved by the Circuit Court of Appeals, was to bar his wife from any statutory rights in the transferred property in case the woman whom he was about to marry should survive him.

In its consideration of the *Colorado National Bank* case, this Court stated:

> "The court's opinion seems to rest upon an erroneous interpretation of the term 'in contemplation of death.' The meaning of this was much discussed in *United State* v. *Wells, supra.* We adhere to what was there said. The mere purpose to make provision for children after a donor's death is not enough conclusively to establish that action to that end was 'in contemplation of death.' Broadly speaking, thoughtful men habitually act with regard to ultimate death but something more than this is required in order to show that a conveyance comes within the ambit of the statute."

In the *Colorado National Bank* case, the purpose of the grantor was to make certain that the trust property would be used after his death for his daughter and her children regardless of his intention to speculate in the stock market. In the instant case, the purpose of Kroger was to make certain that the trust property would be used after his

death for his children and their children regardless of his intention to remarry.

The similarity of the facts of these cases and the divergence of the conclusions reached amply demonstrate the erroneous interpretation of the term "in contemplation of death" by the courts below and the conflict with this Court's pronouncements.

II

THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW, WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The question of Federal law is, if Kroger's irrevocable transfers of property in trust on February 13, 1928, at age 68, were made in contemplation of death, whether only to the extent of the interest therein then transferred by trust, namely, .69565, is the trust property, valued at the date of his death, includible in his gross estate.

Kroger retained an interest in the trust property consisting of income therefrom for his life; he transferred

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The attention of this Court is respectfully called to the importance of the question presented in this case, not only because of the amount involved (approximately $10,500,000 in tax and interest), but more particularly because of the effect of the decisions of the courts below upon the administration of the Federal estate tax statute. Already, The Tax Court of the United States has relied upon its decision and that of the Circuit Court of Appeals in this case and has held that a transfer in trust made by a woman, 19 years before death, when 57 years of age and about to be remarried, intended to prevent her prospective husband from attaining any interest in her estate as a statutory heir or any interest in her estate by courtesy and to protect the interest of her two children and their descendants in her estate in the event of her death prior to his death, was made in contemplation of death [Memorandum Opinion of the Tax Court entered January 3, 1945 in *Estate of Marion S. Gano, deceased, etc.* v. *Commissioner*, CCH Dec. 14,311 (M)]. Perhaps other cases involving substantially identical facts are pending.

The *Gano* case, if appealed, will go to the Circuit Court of Appeals for the Third Circuit; and in the event of a reversal, a conflict between circuits could bring the question before this Court. Failure of this Court to grant certiorari in this proceeding will cause the rights of the petitioners to be foreclosed in the event the *Gano* case reaches this Court and results in a contrary conclusion.

an interest therein consisting of income to his children for their lives and of corpus over to his granchildren upon the death of his last surviving child. As a result of his retained life interest, he received in cash $4,327,980.46 (R. 93, 96) which became a part of his gross estate. Under the decisions of the courts below, this retained life interest, namely, $4,327,980.46, as well as the entire value at date of death of the trust properties, namely, $12,197,904.40 (R. 74), is included in gross estate. This life interest was never transferred; it was obliterated by his death (*May* v. *Heiner,* 281 U. S. 238).

The extent of the interest transferred by trust, i. e., the quantum of his irrevocable inter vivos gift, was .69565 of the trust property ("Table A" of Sec. 81.10 of Estate Tax Regulations 105 and of Sec. 86.19 of Gift Tax Regulations 108; *Robinette* v. *Helvering,* 318 U. S. 184).

The courts below held in effect that Kroger's gift by trust was in contemplation of death. That gift should then be valued as at the date of his death. The gift was .69565 of the trust property. Therefore, its value at the date of death should be .69565 of the then value of that property.

The courts below failed to value the gift as at the date of death. Both courts applied the statute as though the words "to the extent of any interest therein" were not a part thereof. They included the value at date of death of the trust property as a whole. They failed to include that property in gross estate only to the extent of the interest therein, .69565, representing the gift.

We believe that the question here is an important question of Federal law, which has not been, but should be, settled by this Court.

Counsel for petitioners certify that in their opinion this petition is well founded and that it is not interposed for delay.

WHEREFORE, it is respectfully submitted that the petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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APPENDIX

Revenue Act of 1926 (c. 27, 44 Stat. 9), as amended by the Joint Resolution of March 3, 1931 and by the Revenue Acts of 1932 and 1934:

> "Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—
>
> * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth. . . ."

The amendments, indicated by italics, are not retroactively effective as to transfers completed prior to March 3, 1931. *Hassett* v. *Welch* (1938), 303 U. S. 303; *Helvering* v. *Proctor* (CCA-2, Jan. 12, 1944), 140 Fed. (2d) 87; *Estate of Lloyd* v. *Commissioner* (CCA-3, March 31, 1944), 141 Fed. (2d) 758, 762.

"Table A" of Sec. 81.10 of Estate Tax Regulations 105 and of Sec. 86.19 of Gift Tax Regulations 108 is in part as follows:

"Table, single life, 4 percent, showing the present worth of an annuity, or a life interest, and of a reversionary interest.

1.	2. Annuity, or present value of $1 due at the end of each year during the life of a person of specified age.	3. Reversion, or present value of $1 due at the end of the year of death of a person of specified age.
Age	*Annuity*	*Reversion*
*	$ *	$ *
*	*	*
*	*	*
68	6.91298	.69565"

No. 295

In the Supreme Court of the United States

OCTOBER TERM, 1944

ESTATE OF B. H. KROGER, DECEASED, CHESTER F. KROGER, IRVING W. PETTENGILL, HUBERT HOMAN AND THE PROVIDENT SAVINGS BANK AND TRUST COMPANY, EXECUTORS, PETITIONERS

v.

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No. 998

ESTATE OF B. H. KROGER, DECEASED, CHESTER F. KROGER, IRVING W. PETTENGILL, RUDOLF HOMAN AND THE PROVIDENT SAVINGS BANK AND TRUST COMPANY, EXECUTORS, PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court of the United States (R. 64–86), entered August 17, 1943, is not reported. The opinion of the Circuit Court of Appeals for the Sixth Circuit (R. 250–263) is reported in 145 F. 2d 901.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 4, 1944 (R. 249). The

petition for a writ of certiorari was filed on February 28, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the court below erred in sustaining the Tax Court's finding ~~found~~ that transfers in trust, made by the decedent in 1928, were made in contemplation of his death within the meaning of Section 302 (c) of the Revenue Act of 1926.

2. If so, whether the value of the corpora of these trusts at the date of the decedent's death is includible in his gross estate or whether there should be excluded therefrom the value on the date of the transfer of the reserved right to the income therefrom.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.
>
> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of * * * his death, except in case of a bona fide sale for an adequate

and full consideration in money or money's worth. * * *[1]

STATEMENT

The facts as found by the Tax Court (R. 65–74) and restated in the opinion of the Circuit Court of Appeals (R. 252–258) may be summarized as follows:

In 1927, the decedent, B. H. Kroger, a resident of Cincinnati, Ohio, who was born in 1860, sold his stock in the Kroger Grocery and Baking Company for $24,397,000 (R. 65–66). Shortly thereafter, he made outright gifts of $1,000,000 cash or its equivalent to each of his children by his first wife who had died in 1899 (R. 66–68), and, on February 13, 1928, set up two trusts, one for $2,000,000 and the other for $10,000,000, in favor of his children and their issue. The decedent retained the income therefrom for his life, but the transfers were otherwise absolute. (R. 68–69.) At the time, the decedent (then 68 years of age) planned to remarry, but did not want his intended wife to share with his children in the bulk of his estate at his death. Consequently, he proposed to execute a prenuptial agreement to accomplish his purpose, but was dissuaded from so doing by one of his sons and persuaded instead to create the

[1] This section was amended, but in particulars not material here, by Section 803 of the Revenue Act of 1932, c. 209, 47 Stat. 169, and by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680.

irrevocable trusts in question. (R. 69–70.) On March 3, 1928, he entered into the contemplated marriage (R. 71), and on August 4, 1928, executed his last will and testament, making due provision for his wife, and providing that the rest and residue of his estate should go to his children and their issue (R. 72–73). The decedent died on July 20, 1938, of heart failure (R. 73–74).

The Tax Court found that the creation of the two trusts on February 13, 1928, and the contemporaneous transfer of $12,000,000 to the trustees were for the purpose of barring his prospective wife, should she survive him, from any statutory rights in the transferred property, and that these transfers were made in contemplation of his death (R. 74). Accordingly, the Tax Court sustained the Commissioner's deficiency determination to the extent that it was based upon the inclusion of the value of the corpora of these trusts at the decedent's death in his gross estate (R. 86), and determined a deficiency in estate taxes in the sum of $8,647,700.89 (R. 87).

The court below affirmed the decision of the Tax Court (R. 263).

ARGUMENT

1. The petitioners' contention that the decision of the Court below is in conflict with the decisions of this Court in *United States* v. *Wells,* 283 U. S. 102, and *Colorado Bank* v. *Commissioner,* 305 U. S. 23, is without merit. Both cases hold that

whether a transfer is made in contemplation of death depends upon the decedent's dominant motive.[2] The court below recognized that this was the controlling principle (R. 252), as did the Tax Court (R. 78), and both courts, we submit, correctly applied that principle to the facts in this case.

The taxpayer has the burden of proof and hence must show that a positive life motive actuated the transaction and that "contemplation of death" formed no substantial part of the decedent's motivating purpose. *McCaughn* v. *Real Estate Co.*, 297 U. S. 606; *First Trust & De-*

[2] In the *Colorado Bank* case, the Board of Tax Appeals had found that the purpose which actuated the decedent in making the transfer there in question (under which he had retained no right to income) was to free himself to speculate on the stock market for the rest of his life without fear that the loss of his fortune would leave nothing for his daughter and her children at his death. This Court agreed with the Board's conclusion that a transfer so motivated might properly be said not to have been made in contemplation of his death within the meaning of the statute. It was in this situation that the Court said (p. 27) that "the mere purpose to make provision for children after a donor's death is not enough *conclusively* to establish that action to that end was 'in contemplation of death'." (Italics supplied.) This Court did not say that the transfer would not have been within the statute if the purpose to make provision for the objects of the decedent's bounty at or after death, or to anticipate such provision, had been an inducing motive, as the Tax Court has found it to be in this case, in making it. Cf. *City Bank Farmers Trust Co.* v. *McGowan*, No. 294, decided by this Court January 29, 1945; and see *Igleheart* v. *Commissioner*, 77 F. 2d 704 (C. C. A. 5th).

posit Co. v. *Shaughnessy,* 134 F. 2d 940, 941–942 (C. C. A. 2d), certiorari denied, 320 U. S. 744. In this case, the sole motive actuating the decedent in making the transfers was found by the Tax Court to have been the purpose to prevent his intended wife from sharing in the transferred property with his children at his death (R. 74). Since this finding was based solely on the petitioners' evidence, they themselves established what is manifestly not a life but a death purpose as the motivating factor in making the transfer.

2. Likewise without merit is the petitioner's alternative contention that the value of the reserved right to the income on the date of the transfers is to be deducted from the value of the corpora of the trusts on the date of death. The statute is plainly to the contrary as are the decisions interpreting it. See *Milliken* v. *United States,* 283 U. S. 15, 23; *Chase Nat. Bank* v. *United States,* 278 U. S. 327, 337; *Heiner* v. *Donnan,* 285 U. S. 312, 327; *Helvering* v. *Hallock,* 309 U. S. 106, 111; *Central Hanover Bank Co.* v. *Kelly,* 319 U. S. 94, 98; *Fidelity-Philadelphia Trust Co.* v. *Rothensies,* No. 263, decided by this Court February 5, 1945; *Igleheart* v. *Commissioner,* 77 F. 2d 704, 711 (C. C. A. 5th); *Liebmann* v. *Hassett,* 50 F. Supp. 537 (Mass.).

CONCLUSION

There is no conflict on either point and no important question presented which requires this Court's consideration. Furthermore, the court below has correctly construed both of the provisions of the statute here in question. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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